IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-455-38-6466 AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Edmond RUIZ

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1984

Edmond RUIZ

This appeal has been taken in accordance with Title 46 United States Code 239b and Title 46 Code of Federal Regulations 137.30-1.

By order dated 1 August 1972, an Administrative Law Judge of the United States Coast Guard at Galveston, Texas, revoked Appellant's seaman's documents upon finding him guilty of the charge of "conviction for narcotic drug law violation." The specification found proved alleges that Appellant was convicted on 17 April 1972 by District Court of Brazoria County, Texas, 23rd Judicial District, a court of record, for violation of the narcotic drug laws of the State of Texas.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence a certified copy of the judgment of conviction and chemical analysis of the substance found on Appellant's person.

In defense, Appellant offered in evidence a copy of the offense report, Police Department, Freeport, Texas.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order revoking all documents issued to Appellant.

The entire decision was served on 14 August 1972. Appeal was timely filed on 12 September 1972.

FINDINGS OF FACT

On 17 April 1972 Appellant was convicted of possession of marihuana under Texas Law. On 6 November 1971 Appellant was arrested in Freeport, Texas, for engaging in a fight and a search of his person by police revealed a number of seeds in his back pocket. Upon examination these seeds were found to be marihuana and this led to Appellant's conviction.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that a certified copy of a Texas court conviction for marihuana under the Texas Penal Code 725b (13) does not meet the burden of proof for the revocation of a Merchant Mariner's Document under 46 U.S.C 239b when all that the individual was known to possess was seeds of marihuana.

APPEARANCE: Appellant, by William T. Armstrong.

OPINION

I

Although not necessary to the determination of this appeal, it should be noted that the Administrative Law Judge was in error when he advised Appellant that an order less than revocation could be entered in the event experimentation was shown and that such experimentation could be used as a defense in this type proceeding. When a charge is brought under 46 U.S.C. §239b based on a conviction under a narcotic drug law, revocation is mandatory. It is only in a hearing based on a charge of misconduct by virtue of possession, use, sale or association with narcotic drugs under the authority of R. S. 4450 and 46 CFR 137.03-4 that a showing of experimentation allows the Administrative Law Judge to enter an order less than revocation.

II

Appellant's documents were revoked under the authority of 46 U.S.C §239b which states that action may be taken to revoke the seaman's documents of "(1) any person who . . . had been convicted in a court of record of a violation of the narcotic drug laws of the United States . . . or any State . . ." Section 239a states that for the purposes of Section 239b, "narcotic drug shall . . . include marihuana as defined by Section 102(15) of such Act [21 U.S.C. §802(15)]." Thus for the purposes of Section 239b, the term "narcotic drug law" is limited by the federal definition of"narcotic drug" as found in 21 U.S.C. §802(15). This necessarily means, that where Section 239b authorizes revocation of documents for a conviction under the "narcotic drug law" of any State, that section incorporates the state narcotic drug law only to the extent that the State's definition of narcotic drug falls within the federal definition of narcotic drug.

The Administrative Law Judge's opinion was that 46 CFR §137.03-10 mandated that introduction of a State court conviction under its narcotic drug law established a violation under Section 239b, and that the burden shifted to the Appellant to go forward with evidence to disprove the conviction. However, 137.03-10 (a) states in part that action may be taken "[A]fter proof of a narcotics conviction by a court of record as required by Title 46, U. S. Code, Section 239b . . ." It follows from the prior discussion that in order to establish a violation under 137.03-10 (a) it is necessary not only to prove the state court conviction, but also to prove that the substance upon which the State charge is based falls within the Federal definition of "narcotic drug". This same reasoning also applies to 46 CFR §137.20-110, which states that a "judgment of conviction for a

narcotic drug law violation . . . by a State court of record is conclusive in proceedings under Title 46, U. S. Code, section 239b;" this necessarily means that such conviction is conclusive only after it is shown that the State offense falls within the federally defined "narcotic drug law".

III

In the instant case the Appellant was found to be carrying certain seeds which were determined to be marihuana seeds. This gave rise to a conviction for possession of marihuana under TEXAS PENAL CODE ANN. (1964) Art. 725b §(13) which states:

> Section 1. The following words and phrases, as used in this Act shall have the following meanings, unless the context otherwise requires: . . .
>
> (13) The term "Cannabis" as used in this Act shall include all parts of the plant Cannabis sativa L., whether growing or not, the seeds thereof, the resin extracted from any part of such plant and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin; but shall not include the nonresinous oil obtained from such seed, nor the mature stalks of such plant, nor any product or manufacture of such stalks, except the resin extracted therefrom and any compound, manufacture, salt, derivative, mixture, or preparation of such resin. The term "Cannabis" shall include those varieties of Cannabis known as Marihuana, Hashish, and Hasheesh."

The federal definition of marihuana for the purposes of Section 239b is found in 21 U.S.C 802 (15) which states:

> "(15)The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plants, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber oil, or cake, or the sterilized seed of such plant which is incapable of germination. (Emphasis added).

Thus the Texas definition of narcotic drug includes any seeds of marihuana, whether or not they are capable of germination, while the federal definition of narcotic drug only includes marihuana seeds capable of germination.

IV

The Administrative Law Judge viewed the Appellant's argument, that the government had to prove that the seeds found on his person were capable of germination, as an attempt to go behind the

State court conviction. The purpose of 46 CFR §137.20-110 in making the State court conviction conclusive is to prevent relitigation of the question of guilt of the drug offense, and this is what precluded going behind the conviction. However, here Appellant is not attacking the State court conviction; he is arguing that even though he was guilty under the State law, the government did not prove that the offense upon which the conviction was based fell within Section 239b. In order to prove a violation under 46 U.S.C. §239b (b) (1), the government must prove initially only that Appellant was convicted of a violation of the narcotic drug law of the State. However, when the Appellant raises a reasonable question as to whether the substance upon which the State charge and conviction were predicated falls within the ambit of the federal definition of "narcotic drug", and thus within the coverage of Section 239b, he must be given the opportunity to prove that he falls within the exception claimed. It should be made clear that the burden is on the Appellant to prove that he falls within the exception. See Smith v. United States, 269 F. 2d 217 (C.A.D.C. 1959), cert. denied, 80 S.Ct. 130. Since Appellant was denied the opportunity to establish an exemption within the federal statute defining marihuana, the case will be remanded to the Administrative Law Judge with directions to reopen the record for further proceedings.

ORDER

The order of the Administrative Law Judge dated at Galveston, Texas, on 1 August 1972, is vacated and the record remanded for proceedings consistent with this opinion.

C.R. BENDER
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 7th day of August 1973.

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Narcotics

Defense, Federal definition of narcotics not satisfied